

Office of Chief Counsel
Internal Revenue Service
memorandum

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FNPanza

date: September 10, 2002

To: ROBERT GEE
Compliance Group 1
Territory 2, Oakland,
SB/SE, Area 13

From: FRANK N. PANZA
Attorney (SBSE)

subject: **Son of BOSS and 318/302 - Forms 872: Persons to Execute and
Form of Consents**

This memorandum discusses our recommendations regarding who should sign any Consents to Extend the Period of Limitations on Assessments (Consents, or S/L Extension Consents) in the captioned cases, as well as language to be used in those extensions when the relevant taxpayer insists on restricting the terms of a Consent.

The proposed restricted Consent language originally addressed only the adjustments that might arise in connection with the Son of BOSS transactions we've been discussing.¹ We have made an addition to that language to take into account the 318/302 cases you asked us to include in the Consents. However, in doing so, we recognized even more emphatically than we had, that there is a significant amount of risk in utilizing a "model" Restricted Consent.

Therefore, while we have provided you with a form of such a model consent, we emphasize that a thorough review of each case must be done prior to the execution of any Restricted Consent to determine if there are any other potential adjustments, including adjustments for other listed

¹ Those are cases in which the taxpayer borrows an amount at a higher than market interest rate, receives that amount plus a "premium," and ultimately contributes the total received to an LLC.

transactions, and to determine whether the language in the model consent is in fact the best way to refer to those other transaction in the relevant Restricted Consent. See IRM § 25.6.22.8.2(e)(2) (rev. 1-1-02) (restricted consent should be avoided if possible, until the examination has been completed to the extent that all potential issues have been identified). All of the potential adjustments must be explicitly addressed and included in the Consent. Therefore, especially in any situation where there are potential adjustments other than those arising in a transaction described in Notice 2000-44, if there are any other potential adjustments in these case, we request that you seek advice regarding what restrictive language would be appropriate.

WHO SHOULD SIGN CONSENTS

Summary

Generally, unless the power to do so is withheld, a CPA or a lawyer named in a duly executed Power of Attorney (Form 2848) is entitled to execute consents, including S/L Extension Consents, on behalf of the person providing the Power of Attorney (POA).

We understand that in this case, [REDACTED] is the subject of a Promoter audit with respect to the Son of BOSS transactions. Its being subject to such an audit likely will result in its having a conflict of interest with persons it is representing who participated in a Son of BOSS transaction. (Your conversations with [REDACTED] make it clear that [REDACTED] is well aware of the likely conflicts.) Consequently, we recommend that the Service make every effort to ensure any S/L Extension Consents it obtains in these cases are signed by the relevant taxpayers (i.e., generally the individuals participating in the shelters, and the LLCs), the relevant Tax Matters Partners, or by duly appointed POA's who are not being subjected to related Son of BOSS audits.

Finally, as we'll discuss below, in order to ensure that an S/L Extension Consent executed by a POA (including [REDACTED]) is valid, we recommend that any Form 2848 appointing a third person as a POA for an organization that qualifies as a TEFRA partnership be signed by all of the appropriate members (where the organization is an LLC), or all of the appropriate general partners, (where the organization is a state law partnership).

Discussion

Section 10.29 of Circular No. 230 provides that:

No attorney, certified public accountant, enrolled agent, or enrolled actuary shall represent conflicting interests in his practice before the Internal Revenue Service, except by express consents of all directly interested parties after full disclosure has been made.

Section 10.52 of that Circular allows the disbarment or suspension of a practitioner before the Service for willful violation of any of the regulations. At this point we can't say that willfulness is present in these cases.

IRM 35.3.12.10 (rev. 5-9-96) specifically deals with conflicts of interest between investors and promoters in the tax shelter context. The Manual requires the Service to seek assurances from the POA that the investors have been informed of the potential conflict of interest situation to protect the integrity of the settlement and litigation process.

At this point, we understand [REDACTED] is considering the conflict potential of its involvement as a POA in these audits. Whatever it concludes, we recommend that the Service seek the assurances described in the preceding paragraph.

Regardless of the assurances the Service obtains, as stated above, we recommend that it (the Service) make every effort to ensure any Consents it obtains in the cases are signed by the relevant taxpayers themselves, by the relevant Tax Matters Partners, or where appropriate (as discussed below) by POAs who are not being subjected to related Son of BOSS audits.

Over the last few years, there have been a number of cases in which taxpayers have challenged the Service's ability to make assessments where the time for making the relevant assessment was extended by a person who had a conflict of interest with the relevant taxpayer. See, in this connection, Transpac Drilling Venture 1982-12 et al. v. Commissioner, 147 F.3d 221 (2d Cir. 1998) (where the Extension was overturned), and Phillips v. Commissioner, 273 F. 3d 1172 (9th Cir. 2001), aff'g., 114 T.C. 115 (2000) (where the Extension was upheld).

In the cited cases, the person whose authority to sign a Consent was challenged was a Tax Matters Partner (TMP), i.e.,

a person whose fiduciary duties to his fellow partners was unquestioned. We've found no case where a court held that a Consent signed by a person whose authority to act was based only on a duly executed POA was invalid on account of that person's having a conflict with his client, although a POA also has fiduciary duties with respect to the persons that POA represents.

Further, the Service has been successful in upholding the validity of S/L Extension Consents except in a very egregious case, i.e., one in which the person signing the relevant Consent was a fiduciary threatened with a criminal prosecution. There has been no case where the simple fact that a POA signing the Consent was undergoing a civil audit was deemed to give rise to such an egregious conflict. Consequently, if [REDACTED] signs a Consent in its capacity as a duly appointed POA, we believe the Service would maintain that Consent bound the relevant taxpayer even if [REDACTED]'s interests and that taxpayer's interests were in conflict.

Nonetheless, [REDACTED]

[REDACTED] such as [REDACTED] might be particularly concerned about any unfavorable publicity arising from its involvement in the [REDACTED] transactions. Further, we believe that the persons ultimately representing those [REDACTED] clients in any litigation regarding the transactions will utilize every reasonable argument in an attempt to prevent or to overturn any [REDACTED] assessment. Consequently, as stated above, we recommend that the Service make every effort to ensure any Consents it obtains in the cases are signed by the relevant taxpayer's themselves or by POA's who are not being subjected to related [REDACTED] audits.

There may also be S/L Extension Consents requested from TEFRA partnerships in these cases.

The regulations relating to TEFRA partnership S/L extensions allow a TEFRA partnership (including an LLC) to appoint a POA to sign the extension. See, Treas. reg. § 301.6229(b)-1, applicable to partnership years beginning on or after 10/4/2001, and Treas. reg. § 301.6229(b)-1T, applicable to the partnership years under audit. Generally, the Form 2848 may serve this purpose, but only if it complies strictly with Treas. reg. § 301.6229(b)-1.

The difference between the temporary and the new regulations is that the temporary regulations refer only to partnerships. Those temporary regulations provide that the authorization for third parties, e.g., POAs, to sign an S/L extension must be signed by all persons who were general partners at any time during the year or years for which the authorization is effective. The new regulations refer both to partnerships and LLCs, and provide that with respect to a partnership, all general partners must sign such an authorization, and with respect to an LLC, only member-managers need sign that authorization. Unless there is some other rule in the regulations relating to LLCs that we haven't found, we think the old regulations applied both to partnerships and LLCs. Cf., Gold-N-Travel v. Commissioner, 93 T.C. 618 (1989) (shareholder substituted for general partner).

Despite the language in the regulations, there is a reasonable amount of helpful case law that indicates that where under a partnership agreement, a partner has the right to appoint a third party to represent the partnership before the Internal Revenue Service, an S/L Extension Consent that third party signs is binding on the partnership, even if the signatures on that Consent do not comply with the terms of Treas. reg. § 301.6229(b)-1T. See, Amesbury Apartments, Ltd. v. Commissioner, 95 T.C. 227 (1990); Agri-Cal Venture Associates v. Commissioner, T.C. Memo 2000-271; cf., Bugaboo Timber Co. v. Commissioner, 101 T.C. 474 (1993). Nonetheless, where the relevant TEFRA entity is an LLC, we think it is advisable for the Service to make every effort to ensure that all of the members of the LLC sign the document that gives a third person the authority to sign an S/L Extension Consent.

Another question arising in those cases will be whether a Consent executed by a TMP, which is also a promoter undergoing a promoter audit, will be valid. In our judgment, so long as the promoter audit is a civil audit, and there is no pending criminal tax investigation of the TMP, the courts will more likely than not uphold the validity of the Consents. Phillips v. Commissioner, supra.

However, to protect the Service against an argument that promoter TMP executed Consents are invalid, the following may be done: (1) if the promoter TMP insists on signing the Consent, then the Service should send a letter to the promoter requesting written assurances that the promoter fully disclosed its conflict of interest to the other members of the LLC or the other partners and obtained their consent to the

promoter's execution of the Consent on their behalf; and/or (2) the Service may ask any partner to extend the statute pursuant to I.R.C. § 6229(b)(1) and (b)(3). See, IRM 4.31.1.12.9.2.2(2) (rev. 1-1-99). (The statute of limitations may be extended with respect to any partner by an agreement entered into with the partner. A consent entered into by a partner extends the statute of limitations for assessment of any additional tax attributable to a partnership item or affected item only for that partner). However, the Consent will not apply to a partnership items unless the Consent specifically references partnership items. I.R.C. § 6229(b)(3); Rhone-Poulenc v. Commissioner, 114 T.C. 533 (2000).

PROPOSED CONSENT LANGUAGE

We are reflecting below, language to be included in Restricted Consents to be obtained in the cases specifically described. There may be other cases in which the Service and taxpayers are willing to enter into Restricted Consent agreements. Rather than trying to anticipate those cases in this memorandum, we will reflect the language to be used in the typical cases, and request that you seek advice regarding that language in other cases that may arise. In addition, since a determination of whether the potential adjustments in these cases are covered by the TEFRA provisions has not been made at this time, we recommend that the Service treat the auditing of these cases both as TEFRA and Non-TEFRA audits. Thus, Consents should be secured not only at the LLC (or partnership level) but also at the participating taxpayer level.

ALL [REDACTED] CASES:

(1) TEFRA partnership level consent. Consents executed by the TMP, (or by a duly authorized POA for the TMP in the relevant TEFRA partnerships) are to be obtained in all of these cases, i.e., cases in which a TEFRA partnership makes a distribution (directly or indirectly) to a taxpayer, who (or which), in turn, sells or otherwise disposes of the property distributed in a taxable transaction, and deducts a loss on the ground that the basis of the property distributed is larger than the Service deems it to be. [Use Form 872-P]

The tax that may be assessed is limited to tax attributable to partnership items and affected items [and related...] that directly or indirectly relate to the

partnership's and partners' participation either directly, or indirectly through another person (or persons), in one or more transactions: (i) identified or referred to as "BLPS (Bond Link Premium Structures)"; (ii) described in or similar to those described in Notice 2000-44, 2000-36 I.R.B. 255; (iii) described in or similar to those described in Notice 2001-45, 2001-33 I.R.B. 129; and/or, (iv) described in or similar to any transaction referred to in Notice 2001-51, 2001-34 I.R.B. 90; (collectively referred to herein as IDENTIFIED TRANSACTIONS);

(2) Individual CASE 1 - Taxpayer consent when there is no intermediary entity, (or when the intermediate entity is a grantor trust in which the taxpayer is the grantor) between the consenting taxpayer, and a TEFRA partnership (or LLC) in which the relevant taxpayer participated. [Form 872]

This agreement extends the period of limitations for assessing tax, penalty, addition to tax, additional amounts and interest, but is limited to that resulting from any adjustments attributable to:

(a) transactions: (i) identified or referred to as "BLPS (Bond Link Premium Structures)"; (ii) described in or similar to those described in Notice 2000-44, 2000-36 I.R.B. 255; (iii) described in or similar to those described in Notice 2001-45, 2001-33 I.R.B. 129; and/or, (iv) described in or similar to any transaction referred to in Notice 2001-51, 2001-34 I.R.B. 90; (collectively referred to herein as IDENTIFIED TRANSACTIONS);

(b) the taxpayer's distributive share of any item of income, gain, loss, deduction, or credit of, or distribution from [insert name and TIN of partnership] (or any other partnership) resulting from a transaction described in (a); and

(c) any partnership items (see section 6231(a)(3)), affected items (see section 6231(a)(5)), computational adjustments (see section 6231(a)(6)), partnership items converted to nonpartnership items (see section 6231(b)) related or attributable to a transaction described in (a).

This agreement extends the period for filing a petition for adjustment under section 6228(b) but only for the items subject to this extension and only if a timely

request for administrative adjustment is filed under section 6227. For partnership items which have converted to nonpartnership items, this agreement extends the period for filing a suit for refund or credit under section 6532, but only for the items subject to this extension and only if a timely claim for refund is filed for such items. For nonpartnership items the provisions of section 6511 are limited to any refund or credit resulting from adjustments for which the period for assessment is extended under this agreement.

NOTE: If the Service utilizes a Form 872 I, significant adjustments will need to be made to the foregoing language.

(3) Individual CASE 2 - Taxpayer consent where there is an intermediary non-TEFRA S-corporation (i.e., tax years beginning after 12/31/96) or non-TEFRA partnership between the taxpayer, and the partnership in which the relevant taxpayer participated. [Form 872]

This agreement extends the period of limitations for assessing tax, penalty, addition to tax, additional amounts and interest, but is limited to that resulting from any adjustments attributable to:

(a) transactions: (i) identified or referred to as "BLPS (Bond Link Premium Structures);" (ii) described in or similar to those described in Notice 2000-44, 2000-36 I.R.B. 255; (iii) described in or similar to those described in Notice 2001-45, 2001-33 I.R.B. 129; and/or, (iv) described in or similar to any transaction referred to in Notice 2001-51, 2001-34 I.R.B. 190; (collectively referred to herein as IDENTIFIED TRANSACTIONS);

(b) the taxpayer's distributive share of any item of income, gain, loss, deduction, or credit of, or distribution from [insert name and TIN of TEFRA partnership] (or any other partnership) resulting from a transaction described in (1)(a);

(c) the taxpayer's distributive share of any item of income, gain, loss, deduction, or credit (or the character thereof) of, or distribution from, [insert name and TIN of non-TEFRA entity]; and,

(d) any partnership items (see section 6231(a)(3)), affected items (see section 6231(a)(5)), computational

adjustments (see section 6231(a)(6)), partnership items converted to nonpartnership items (see section 6231(b)) related or attributable to a transaction described in (a).

This agreement extends the period for filing a petition for adjustment under section 6228(b) but only for the items subject to this extension and only if a timely request for administrative adjustment is filed under section 6227. For partnership items which have converted to nonpartnership items, this agreement extends the period for filing a suit for refund or credit under section 6532, but only for the items subject to this extension and only if a timely claim for refund is filed for such items. For nonpartnership items the provisions of section 6511 are limited to any refund or credit resulting from adjustments for which the period for assessment is extended under this agreement.

(4) PLEASE NOTE THAT IN THE CASE OF AN ENTITY (TEFRA OR OTHERWISE) THAT FLOWS TO A GRANTOR TRUST, THEN TO A TAXPAYER, THE GRANTOR TRUST WILL NOT EXECUTE A FORM 872. RATHER THE PERSON SUBJECT TO TAX ON THE GRANTOR TRUST'S INCOME IS TO EXECUTE THE FORM 872. IF THE SERVICE ISN'T SURE WHETHER THE TRUST IS A GRANTOR TRUST, IN ORDER TO PROTECT ITSELF, IT (THE SERVICE) SHOULD REQUEST THAT THE TRUSTEE ALSO EXECUTE A FORM 872 AND A FORM 56, AND PROVIDE THE TRUST INSTRUMENTS. Questions regarding a trust's status as a grantor trust should be directed to the Paul Zamolo, Associate Area Counsel, Group 2, San Francisco, CA.

Please let me know whether you have any questions respecting this memorandum.

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